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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-708

MERLE O. GREENE, JR. and JULIA GREENE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Merle and Julia Greene, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. A1-A26) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 16, 1978. (App. A, *infra*, p. A26). Petitioners' timely motion for rehearing or for rehearing en banc was denied on September 28, 1978. (See App. B, *infra*, p. A29). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. (a) Whether Rule 104 of the Federal Rules of Evidence requires the Trial Court to decide the threshold question of whether to admit statements of a conspirator under Federal Rules of Evidence 801(d)(2)(E) and, if so, (b) what standard does the Trial Court use in determining this question, and (c) may the Trial Court consider statements of co-conspirators in deciding whether the Government has met its burden of proof of showing evidence of a conspiracy so as to admit into evidence the co-conspirator's statements?

2. (a) Whether the "Harmless Error" Rule may be applied pursuant to Rule 52(a) of the Federal Rules of Criminal Procedure so as to affirm Petitioners' convictions on substantive counts when there has been a misjoinder of offenses and defendants under Rule 8, Federal Rules of Criminal Procedure; (b) Whether the decision of the Eighth Circuit in this case is in conflict with applicable decisions of this Court and of another circuit court of appeals if this case is perceived as being governed by Rule 14, Federal Rules of Criminal Procedure.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment Six.

Amendment Six

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. Section 371.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Federal Rules of Evidence 104.

Rule 104. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1930.

Federal Rules of Evidence 801(d)(2)(E).

Rule 801. Definitions

* * *

(d) Statements which are not hearsay. A statement is not hearsay if—

* * *

(2) Admission by party-opponent. The statement is offered against a party and is * * * (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Federal Rules of Criminal Procedure 8.

Rule 8. Joinder of Offenses and of Defendants

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Federal Rules of Criminal Procedure 14.

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

As amended Feb. 28, 1966, eff. July 1, 1966.

Federal Rules of Criminal Procedure 52(a).

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT

The United States charged Petitioners Merle O. Greene, Jr., his mother, Julia Greene, and a relative of the Greenes, Carolyn Fuel[1] in a ten-count indictment in the United States District Court for the Western District of Missouri with mail fraud and conspiracy to commit mail fraud in violation of 18 U.S.C., Secs. 3, 371 and 1341. Count I charged all defendants with conspiracy; Petitioner Merle Greene was also charged in Counts II, III, IV, V, VI, VIII, and X with mail fraud; Petitioner Julia Greene was also charged in Counts IX and X of mail fraud; Carolyn Fuel was also charged in Counts III, IV, VII and VIII of mail fraud. The jury acquitted Carolyn Fuel of the charge in Count VIII; the Court after verdict by the jury of guilty acquitted Julia Greene of the charges in Count IX.[2]

On appeal the United States Court of Appeals of the Eighth Circuit found insufficient evidence to convict on certain charges and reversed the convictions of Carolyn Fuel on Counts III and IV; and reversed the convictions

1. Carolyn Fuel is not a party to this Petition.

2. The Trial Court sentenced Merle Greene to a term of two (2) years on Count II and concurrent terms of three (3) years probation on each of the other counts, the probation to be consecutive to the terms of imprisonment on Count II. Julia Greene was given a term of three (3) years probation on the counts on which she was convicted.

of all parties on Count I (the conspiracy count). The Appeals Court, however, affirmed the conviction of Fuel on Count VII; the conviction of Julia Greene on Count X; and the convictions of Merle Greene on Counts II, III, IV, V, VI, VIII and X.

The Indictment in general alleged that the three defendants had defrauded different insurance companies by submitting fraudulent documentation to obtain money from such companies in connection with automobile accident and insurance claims. The Indictment covered the period from January 1, 1973 to August 1, 1975.[3] During the course of a week and a half long trial, the Government introduced evidence of claims of eight automobile accidents, four burglaries and one automobile larceny, although the substantive counts of the Indictment were based on only three automobile accidents and three of the burglaries. There was no evidence that any of the automobile accidents, burglaries or larceny were "staged"; the Government's theory rested partially upon evidence that the documentation submitted to recover under policies of insurance was fraudulent.

At trial, Petitioners objected to the introduction of any co-conspirator's statements being introduced against them on the conspiracy count on the grounds that there was no evidence at all at this point in the trial showing the existence of a conspiracy. The Trial Court ultimately refused to make any determination, preliminarily or otherwise, as to the sufficiency of the evidence as to the conspiracy to this point of the trial and rather left the matter to the jury to make the determination whether a conspiracy existed so as to permit its consideration of statements

3. For a more detailed recitation of the facts of this case, Petitioner refers the Court to the Opinion of the Eighth Circuit, App. pp. A2-A4, and Government's Ex. 163, appended thereto.

of co-conspirators in deciding the fate of Petitioners on the conspiracy count. The Government was thus able to introduce against Petitioners as being in furtherance of the conspiracy the statements of Fuel as to a June 5, 1975 accident and a February 6, 1975 burglary loss which had no connection with these Petitioners; and as to Petitioner Julia Greene, statements as being in furtherance of the conspiracy of Merle Greene's April 24, 1973, April 11, 1974, and October 22, 1974 and June 6, 1975 accident claims and his January 1, 1973, December 2, 1973, and September 9, 1975 burglary and larceny claims—all of which had nothing to do with Julia Greene.

The Trial Court did instruct the jury it was to weigh the evidence against each defendant individually and separately.

REASONS FOR GRANTING THE WRIT

1. Introduction.

This Court should grant the writ of certiorari in this case because the decision of the Court of Appeals conflicts with the decisions of other courts of appeals on the same matter and has decided an important question of federal law—concerning the construction of Rule 104, Federal Rules of Evidence—which has not been but should be settled by this Court. Had the Trial Court correctly applied Rule 104, Federal Rules of Evidence, to the facts of this case, co-conspirator statements would never have been admitted against Petitioners as there never was adduced evidence showing the existence of a conspiracy. The appellate court was in error for not reversing Petitioners' convictions and applying Rule 104 to the facts of this case, *i.e.*, the preliminary question of the existence of co-conspirator statements.

1(a).[4] The decision below conflicts with the provisions of Rule 104, Federal Rules of Evidence, which requires that the Trial Court—not the jury—make the preliminary

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4. The cases concerning this issue have been the topic of much discussion in the legal literature: Recent Developments, The Preliminary Question of the Existence of Conspiracy for Admitting Statements under Federal Rules of Evidence 801(d)(2)(E) and 104(a); The Continuing Vitality of the Federal Common Law of Evidence, 1 ATLA Criminal Reports pp. 37-40 (Sept. 1978); Kessler, The Treatment of Preliminary Issues of Fact in Conspiracy Litigations; Putting the Conspiracy Back Into the Coconspirator Rule, 5 Hofstra L.Rev. 77 (1976); Bergman, The Coconspirator's Exception: Defining the Standard of Independent Evidence Test Under the New Federal Rules of Evidence, 5 Hofstra L.Rev. 99 (1976); Annot., Necessity and Sufficiency of Independent Evidence of Conspiracy to Allow Admission of Extrajudicial Statements of Coconspirators, 46 A.L.R. 3d 1148 (1972); J. Weinstein and M. Berger, Weinstein's Evidence, Section 801(d)(2)(E)[01] (Matthew Bender and Co. 1975) [hereinafter cited as Weinstein].

determination of admissibility of co-conspirator's statements made in furtherance of the conspiracy. Although the Eighth Circuit's opinion in this case cited with approval its decisions in *U.S.* v. *Madsen*, 573 F.2d 1046 (8th Cir., 1978) and *U.S.* v. *Bell*, 573 F.2d 1040 (8th Cir., 1978), required the trial court to make the preliminary determination of admissibility under Rule 104, the Court declined to make these decisions "retroactive". However, Rule 104, Federal Rules of Evidence, was in effect long before the trial of this cause, having been enacted on January 2, 1975 by the Congress, Pub.L. 93-595, Section 1, 88 Stat. 1926.

In *U.S.* v. *Petrozziello*, 548 F.2d 206 (1st Cir., 1977), the Court also held that the preliminary determination of whether to admit co-conspirator's statements was for the Trial Court, and not the jury. The Sixth and Fifth Circuits have also adopted the position of the Eighth and First Circuits on this issue. *U.S.* v. *Enright*, 23 Cr.L. 2335 (6th Cir., June 20, 1978); *U.S.* v. *James*, 576 F.2d 1121 (5th Cir., 1978). The Second, Ninth and Tenth Circuits are apparently of the same view although the jury is given the ultimate decision whether to admit the evidence. *U.S.* v. *Geaney*, 417 F.2d 116 (2nd Cir., 1969); *Carbo* v. *U.S.*, 314 F.2d 718 (9th Cir., 1963); *U.S.* v. *Dearing*, No. 77-1112 (10th Cir., Aug. 21, 1978). The Third Circuit cases are unclear although the latest decision from that court appears to permit the jury to make the preliminary finding. *U.S.* v. *Krogstad*, 576 F.2d 22 (3rd Cir., 1978).

Under the practice of the Trial Judge making the preliminary determination of admissibility, if it is later determined after the evidence is admitted that the prosecutor failed to meet his burden of proof on the conspiracy issue a mistrial must be ordered. *U.S.* v. *James*, *supra*, at p. 1132; *U.S.* v. *Macklin*, 573 F.2d 1046, at pp. 1046, 1049; *U.S.* v. *Petrozziello*, *supra*, at p. 23, n. 3.

The Fourth and Seventh Circuit decisions are still to the effect that the matter is for the jury to decide. *U.S.* v. *Grow*, 394 F.2d 182, 203 (4th Cir., 1968); *U.S.* v. *Lawler*, 413 F.2d 622, 627-28 (7th Cir., 1969); *U.S.* v. *Wilkinson*, 513 F.2d 227 (7th Cir., 1975).

1(b). This Court has held in dictum that the standard the trial court must follow in determining the threshold question of whether the prosecution had adduced sufficient evidence to admit the statements of co-conspirators was "substantial, independent evidence of the conspiracy, at least enough to take the question to the jury." *U.S.* v. *Nixon*, 418 U.S. 683, 701, n. 14 (1974). One commentator has stated that, even with this pronouncement, the Supreme Court has not offered any definitive guidance in this area. "And has not adopted a standard supported by adherents of either position." Bergman, *supra*, at p. 103.

The various courts of appeals, however, differ widely on the test to be used. In *U.S.* v. *James*, the Fifth Circuit case cited *supra*, the Court held that a "preponderance of the evidence" test should prevail. To like effect are the Eighth Circuit's decisions in *U.S.* v. *Macklin* and *U.S.* v. *Bell*, cited *supra*; the Sixth Circuit's decision in *U.S.* v. *Enright*, cited *supra*; the First Circuit's decision in *U.S.* v. *Petrozziello*, cited *supra*; and the Seventh Circuit's decision in *United States* v. *Santiago*, 7th Cir. 8/22/78, 24 Cr.L. 2045.

The Ninth Circuit requires only that a prima facie case of conspiracy be established and held that slight evidence of the defendant's and the declarant's connection to it is sufficient. *U.S.* v. *Wood*, 550 F.2d 435, 442 (9th Cir., 1976); *U.S.* v. *Dixon*, 562 F.2d 1138 (9th Cir., 1977). The Second, Third and Fourth Circuits require a "fair preponderance" of the evidence although the Second Circuit's definition of "fair preponderance" is less than a

"prima facie" definition.[5] *U.S.* v. *Stanchich*, 550 F.2d 1294 (2nd Cir., 1977); *U.S.* v. *Trowery*, 542 F.2d 623 (3rd Cir., 1976); *U.S.* v. *Jones*, 542 F.2d 186, 203-04 (4th Cir., 1976). The Tenth Circuit follows this Court's test laid out in *U.S.* v. *Nixon, supra*; see *U.S.* v. *Gutierrez*, 576 F.2d 269 (10th Cir., 1978).

1(c). Finally, various circuit courts of appeals are in conflict on the issue of the type of evidence which may be considered on the preliminary question of the admissibility of the co-conspirator's statements. Prior to the enactment of the Federal Rules all courts required that the admissibility of a co-conspirator's statement be determined upon proof *aliunde*—on evidence exclusive of the statement itself. See, *e.g.*, *Glasser* v. *U.S.*, 315 U.S. 60, 75 (1942). Rule 104(a) of the Federal Rules of Evidence, however, specifically provides that the judge may consider hearsay in making his determination of preliminary questions. In *U.S.* v. *Martorono*, 557 F.2d 1 (1st Cir., 1977), the Court read the rule to permit the Court to consider the co-conspirator's statements sought to be admitted in deciding whether existence of the conspiracy had been established. The Fifth, Eighth, and Sixth Circuits have now expressly disagreed with the decision in *Martorono*. *U.S.* v. *James, op. cit.*, at p. 1044 (5th Cir. 1978); *U.S.* v. *Enright, supra*, at p. 7, n. 4 (6th Cir.); *U.S.* v. *Macklin, supra*, at p. 1046.

2. Introduction.

The Court of Appeals in the instant case in effect applied the "harmless error" rule (Rule 52(a), Federal

5. The Second Circuit test would apparently permit admission of conspirator statements on a substantive count even though the trial court had dismissed the conspiracy for insufficiency. *U.S.* v. *Cafaro*, 455 F.2d 323 (2nd Cir.), *cert. denied*, 406 U.S. 918 (1972).

Rules of Criminal Procedure) in affirming Petitioners' substantive count convictions after holding that there was insufficient evidence to convict Petitioners on the conspiracy count.[6] In so doing, the decision of the Eighth Circuit is in conflict with decisions of other Federal courts of appeals Alternatvely, if this case is perceived as being governed by the provisions of Rule 14, Federal Rules of Criminal Procedure, the Eighth Circuit's opinion in this case is in conflict with this Court's decision in *Schaffer* v. *U.S.*, 362 U.S. 511 (1960), and with the Second Circuit's decision in *U.S.* v. *Kelly*, 349 F.2d 720 (2nd Cir., 1965), *cert. denied*, 384 U.S. 947 (1966).

2(a). There can be no doubt that the Eighth Circuit decision holding there was no conspiracy resulted in a misjoinder of offenses and defendants under Rule 8, Federal Rules of Criminal Procedure. See *McElroy* v. *U.S.*, 164 U.S. 76 (1896), at 81: "Joinder cannot be sustained where the parties are not the same and where the offenses are in nowise parts of the same transaction." *Kotteakos* v. *U.S.*, 328 U.S. 750 (1946), at pp. 764-65.

The Eighth Circuit's decision[7] in this case in determining that any error was harmless is in accord with the Second, Ninth,[8] and District of Columbia Circuits[9] in this

6. The holding of the appellate court that there was insufficient evidence of the conspiracy results in a misjoinder of offenses and defendants under Rule 8, Federal Rules of Criminal Procedure.

7. There appears to be also an intra circuit conflict in the Eighth Circuit. See *Chubet* v. *U.S.*, 414 F.2d 1018, 1020 (8th Cir., 1969).

8. There appears to be also an intra circuit conflict in the Ninth Circuit. See *Metheany* v. *U.S.*, 365 F.2d 90, 94-95 (9th Cir., 1966).

9. There appears also to be an intra circuit conflict in the District of Columbia Circuit. See *Cupo* v. *U.S.*, 359 F.2d 990, 993 (D.C. Cir., 1966), *cert. denied*, 385 U.S. 1013 (1967).

regard. See, *e.g., U.S.* v. *Turbide,* 558 F.2d 1053 (2nd Cir.), *cert. denied,* 98 S.Ct. 421 (1977); which held:

> "It is well-settled in this circuit that the harmless error doctrine applies to misjoinder of counts under Fed. R. Crim. P. 8(b) . . . [W]hen evidence tending to prove the charge that should have been severed would nevertheless have been admissible at the trial of the objecting codefendant, and was admitted subject to appropriate limiting instructions, any error was harmless."

Accord: *U.S.* v. *Roselli,* 432 F.2d 879, 901 (9th Cir., 1970), *cert. denied,* 401 U.S. 924 (1971); *Baker* v. *U.S.,* 401 F.2d 958, 973-74 (D.C. Cir., 1968), *cert. denied,* 400 U.S. 965 (1970).

However, the First, Third, Fourth, Fifth, Sixth, Seventh, and Tenth Circuits take the position that a misjoinder under Rule 8 amounts to prejudice *per se. U.S.* v. *Levine,* 546 F.2d 658 (5th Cir., 1977); *U.S.* v. *Whitehead,* 539 F.2d 1023, 1026 (4th Cir., 1976); *U.S.* v. *Marionneaux,* 514 F.2d 1244, 1248 (5th Cir., 1975); *U.S.* v. *Graci,* 504 F.2d 411, 413-14 (3rd Cir., 1974); *U.S.* v. *Bova,* 493 F.2d 33, 35 (5th Cir., 1974); *U.S.* v. *Reynolds,* 489 F.2d 4, 6 (6th Cir., 1973), *cert. denied,* 416 U.S. 988 (1974); *U.S.* v. *Eagleston,* 417 F.2d 11, 14 (10th Cir., 1969); *U.S.* v. *Gougis,* 374 F.2d 758, 762 (7th Cir., 1967); *King* v. *U.S.,* 355 F.2d 700, 704-05 (1st Cir., 1966); *U.S.* v. *Spector,* 326 F.2d 345, 350-51 (7th Cir., 1963); *Ingram* v. *U.S.,* 272 F.2d 567, 570-71 (4th Cir., 1959). For excellent discussions of the Problem, see Decker, "Joinder and Severance in Federal Criminal Cases: An Examination of Judicial Interpretation of the Federal Rules," 53 Notre Dame Lawyer 147 (1977); Note, "Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion," 6 Hofstra L.Rev. 533 (1978).

2(b). It is to be noted that *Schaffer* v. *U.S.,* 362 U.S. 511 (1969), a five-to-four decision of this Court, is inapplicable to the facts of this case as *Schaffer* involves a construction of Rule 14, Federal Rules of Criminal Procedure, which provides for relief from prejudicial joinder. *Schaffer* assumed that there had been a proper joinder in the first place under Rule 8, and found no prejudice to the defendants. *Schaffer* did not hold that the harmless error rule applied to Rule 8 misjoinders, and, in any event, had the Supreme Court in *Schaffer* found the joinder improper under Rule 8, it would have, it is respectfully urged, adopted a *per se* rule and found prejudice from the improper joinder.[10] Alternatively, Petitioners urge that the decision of the Eighth Circuit in this case is contrary to *Schaffer,* as in *Schaffer* and decisions construing this case the "bad faith" of the prosecutor is a consideration in deciding whether prejudice occurred. The Eighth Circuit's opinion overlooked and did not touch upon the "good faith" aspect of the Prosecutor's decision to charge a conspiracy. See *U.S.* v. *Brandom,* 431 F.2d 1391 (7th Cir., 1970); *U.S.* v. *Branker,* 395 F.2d 881 (2nd Cir., 1968), *cert. denied,* 393 U.S. 1029 (1969); *U.S.* v. *Ong,* 541 F.2d 331 (2nd Cir., 1976). In *U.S.* v. *Branker,* the court defined "good faith" as "the reasonable expectation that sufficient proof [of the charge] would be forthcoming at trial." At p. 887. In the present instance, it was perfectly clear

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10. The trial court in the instant case indicated serious doubts about the propriety of the conspiracy charge and indicated he felt there would be a problem in the event the appellate court found insufficient evidence of the conspiracy, which it did. The court indicated that the evidence on the conspiracy charge may have prejudiced the defendants on the substantive charges. (Transcript p. 92; Sentencing Transcript p. 1).

to the trial court, as mentioned above, that there probably wasn't enough evidence of the conspiracy charge. It was also perfectly clear to the Eighth Circuit there was no such proof, and it should have been perfectly clear to the Government, especially after the exclusion of the statement of Fuel. The Government's theory of conspiracy, it is to be noted, was based upon the erroneous notion that Defendants were related by blood. In *U.S.* v. *Levine,* 546 F.2d 658 (5th Cir., 1977), the court held, *inter alia,* that an improper joinder based upon the prosecutor's erroneous legal interpretation required vacation of defendant's convictions. In these circumstances, it would appear that the conspiracy charge was added by the prosecutor to lend credence to the other counts. The defendants thus should be entitled to a new trial on the substantive counts.

If this case is perceived as being governed by Rule 14, F.R.Cr.P., then the Eighth Circuit's decision is in conflict with the decision of the Second Circuit in *U.S.* v. *Kelly,* 349 F.2d 720 (2nd Cir., 1965), *cert. denied,* 384 U.S. 947 (1966). In *Kelly,* the Court indicated that a severance should be granted when the evidence against one defendant is far more damaging than the evidence against the moving party. See Discussion of this Rule in *U.S.* v. *Mardian,* 546 F.2d 973 (D.C. Cir., 1976), at p. 977. There can be no doubt under the Second Circuit test, that both Petitioners were severely prejudiced by the evidence as to the conspiracy and by the fact as to Julia Greene, that the evidence against Merle Greene was much stronger.[11]

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11. It is well-settled, however, that Rule 14 only applies once a threshhold determination has been made that joinder is proper under Rule 8. *U.S.* v. *Park,* 531 F.2d 754, 760 (5th Cir., 1976); *U.S.* v. *Graci,* 504 F.2d 411, 413 (3rd Cir., 1974); *Ingram* v. *U.S.,* 272 F.2d 567, 570 (4th Cir., 1959); *Cantaneo* v. *U.S.,* 167 F.2d 820, 823 (4th Cir., 1948).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

JAMES R. WYRSCH
Attorney for Petitioners

October 1978

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 77-1876

United States of America,
Appellee,

v.

Carolyn Porter Fuel,
Appellant.

No. 77-1896

United States of America,
Appellee,

v.

Merle O. Greene, Jr. and Julia Greene,
Appellants.

Appeal from the United States District Court for the
Western District of Missouri

Submitted: May 15, 1978
Filed: August 16, 1978

Before HEANEY, BRIGHT and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

Merle O. Greene, Jr., Julia Greene and Carolyn Porter Fuel were charged in a ten-count indictment with mail fraud and conspiring to commit mail fraud in viola-

tion of 18 U.S.C. §§2, 371 and 1341. Greene and Julia Greene were convicted on all counts with which they were charged, and Fuel was convicted on all but one count with which she was charged.[1] The trial court subsequently entered a judgment of acquittal as to Julia Greene with respect to a substantive count. Each appellant raises several issues on appeal. For the reasons discussed below, we reverse each appellant's conviction for conspiracy and the convictions of Fuel on Counts III and IV. We affirm the appellants' remaining convictions on the substantive counts.

I. *Factual Background.*

Count I of the indictment charged the appellants with engaging in a conspiracy from January 1, 1973, until August 1, 1975, to defraud and obtain money from different insurance companies by submitting fraudulent claims on insurance policies in connection with automobile accident and burglary claims. During the pendancy of the alleged conspiracy, Greene submitted eleven claims against nine insurance companies arising out of seven purported automobile accidents, two purported burglaries and one purported automobile larceny. He was paid approximately $15,328 by the insurance companies. During the same period, Julia Greene submitted four claims to four insurance companies arising out of three automobile accidents and one burglary. She was paid approximately $3,475 by the insurance companies. Fuel submitted five claims

1. Julia Greene and Fuel were given concurrent two-year terms of imprisonment on each count. The sentences of imprisonment were suspended and they were each placed on probation for three years. Greene was given a two-year sentence of imprisonment on Count II. He was also given two-year sentences of imprisonment on each of the remaining counts with which he was convicted, but these sentences were suspended and Greene was given a three-year term of probation to run consecutively to the term of imprisonment.

to four insurance companies arising out of four automobile accidents and one burglary. She was paid approximately $2,823 by the insurance companies.

Fraudulent medical reports, work-loss letters, receipts and vehicle repair estimates were submitted in support of some of the claims. The documentation used to support some of the later claims was a duplication of the documentation used to support earlier claims by one or more of the appellants. One of the insurance policies obtained by Greene had been obtained by misrepresentation. No question is raised as to the validity of some of the claims. The individuals submitting the claims were generally related to one another by blood or marriage. Julia Greene is the mother of Merle Greene, and Carolyn Porter Fuel is the cousin of Merle Greene's wife. Individuals submitting claims included Merle Greene's wife, brother, niece and children.

In the nine substantive counts, the appellants were charged with violation of the mail fraud statute by causing certain letters and reports to be mailed to insurance companies in connection with the fraudulent claims mentioned above. Greene was charged in Counts II, III, IV, V, VI, VIII and X; Julia Greene was charged in Counts IX and X; and Fuel was charged in Counts III, IV, VII and VIII.

The trial lasted a week and a half. Prior to trial, Fuel had filed a motion for severance which was denied. On September 12, the government began presenting evidence. It produced twenty-six witnesses and nearly two hundred exhibits. The government concluded its case-in-chief on September 19. At that time, motions for judgments of acquittal were filed by both the Greenes and Fuel. Fuel also filed a motion for severance. Fuel did not testify. She presented two witnesses for impeachment

purposes and rested her case on September 19. Greene testified on his own behalf, but Julia Greene did not. The Greenes presented four witnesses and rested their case on September 20. At the close of all the evidence, each of the appellants again filed motions for judgments of acquittal, and Fuel again filed a motion for severance. The jury returned its verdict on September 21. It found all of the appellants guilty on Count I, the conspiracy count. It also found Greene guilty on Counts II, III, IV, V, VI, VIII and X (these counts involved $6,430); Julia Greene guilty on Counts IX and X (these counts involved no money); and Fuel guilty on III, IV and VII (these counts involved $1,368). It acquitted Fuel on Count VIII. The trial court denied the motion for severance and the motions for judgments of acquittal, except as to Count IX where it granted a judgment of acquittal as to Julia Greene. This appeal followed.

II. *Sufficiency of the Evidence.*

Greene, Julia Greene and Fuel attack the sufficiency of the evidence supporting each of their convictions.[2] We view the evidence in the light most favorable to the verdict rendered, *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Wofford*, 562 F.2d 582, 585 n. 1 (8th Cir. 1977), and take as established all reasonable inferences which tend to support the action of the jury. *United States v. Overshon*, 494 F.2d 894, 896 (8th Cir.), *cert. denied*, 419 U.S. 853 (1974). It is well established that

> circumstantial evidence does not differ in principle from direct evidence, and that in order for a jury to convict on circumstantial evidence it is not necessary that the evidence exclude every reasonable hypothesis except that of guilt but simply that it be sufficient to convince the jury beyond a reasonable doubt that the defendant is guilty.

United States v. Shahane, 517 F.2d 1173, 1177 (8th Cir.), *cert. denied*, 423 U.S. 893 (1975). *See Holland v. United States*, 348 U.S. 121 (1954); *United States v. Jackson*, 549 F.2d 517, 529-530 (8th Cir.), *cert. denied*, 430 U.S. 985 (1977); *United States v. Carlson*, 547 F.2d 1346, 1360 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). We have carefully reviewed the record with these principles in mind and have concluded that there is insufficient evidence to support the appellants' convictions on the conspiracy count, but that there is sufficient evidence to support Greene's convictions on Counts II, III, IV, V, VI, VIII and X; Julia Greene's conviction on Count X; and Fuel's conviction on Count VII.

A. *Conspiracy Count.*

The indictment charged, and the government's position both at trial and on appeal, has been that the appellants were involved in a single conspiracy, over a thirty-three-month period, to defraud insurance companies. The evidence does not support this position. To prove the existence of a conspiracy, the government must establish the existence of an agreement between at least two conspirators to effect the object of the conspiracy, *United States v. Jackson, supra* at 530; *United States* v. *Skillman*, 442 F.2d 542, 547 (8th Cir.), *cert. denied*, 404 U.S. 833 (1971), and that at least one overt act was committed in furtherance of the conspiracy. *United States v. Donahue*, 539 F.2d 1131, 1135 (8th Cir. 1976); *Isaacs v. United States*, 301 F.2d 706, 725 (8th Cir.), *cert. denied*, 371 U.S.

2. Fuel did not waive her motion for a judgment of acquittal at the close of the government's case by presenting evidence as the evidence did not add to the government's case-in-chief. *Cephus v. United States*, 324 F.2d 893, 897 (D.C. Cir. 1963).

818 (1962). To convict an individual of conspiracy, it is not necessary for the government to prove that the individual knew all of the conspirators or was aware of all of the details of the conspiracy, but it is necessary to establish that the individual knowingly contributed to the furtherance of the conspiracy. *United States* v. *Jones*, 545 F.2d 1112, 1115 (8th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977); *United States v. Hester*, 465 F.2d 1125, 1127 (8th Cir. 1972); *Nassif v. United States*, 370 F.2d 147, 152 (8th Cir. 1966).

In this case, the government simply failed to establish the existence of an agreement between the appellants to defraud insurance companies. In so holding, we recognize that an agreement need not be express or formal, *United States v. Jackson*, *supra* at 531, and that it may be established by circumstantial evidence. *Id.*, *United States v. Hutchinson*, 488 F.2d 484, 490 (8th Cir. 1973), *cert. denied*, 417 U.S. 915 (1974). Here, the government produced no statement or admission of the appellants which would indicate a common plan or agreement.[3] Nor did the government establish facts and circumstances from which the existence of an agreement could be inferred.

The government failed to establish that the alleged automobile accidents and burglaries either were "staged" or nonexistent. Thus, a conspiracy to defraud could only be proved by establishing that the appellants agreed to submit fraudulent documentation in support of any claim

3. The government indicated in its opening statement that it would prove by Fuel's own admission that she was not involved in two of the automobile accidents for which she submitted claims. However, the trial court refused to permit the government to introduce Fuel's written admissions because of a possible denial of the appellant's constitutional right of confrontation under *Bruton v. United States*, 391 U.S. 123 (1968). The trial concluded that Fuel's admissions were voluntary and were made with full knowledge of her constitutional rights.

which might arise. We find insufficient evidence from which to infer the existence of such an agreement. Initially, we note that it is difficult to understand how an agreement to defraud could exist that would only come into play at the happening of a fortuitous event—that is, the occurrence of an automobile accident or a burglary. Even if this hurdle is crossed, however, we are faced with the fact that the government also failed to establish that either Fuel or Julia Greene was aware that medical reports submitted on their behalf, or on behalf of others involved in the same accident, were fraudulent,[4] or that either of them knew that other documentation submitted with respect to automobile accident claims by Greene on his own behalf was fraudulent. While there is evidence to convict Fuel and Julia Greene on substantive counts of mail fraud in connection with respect to their individual burglary claims, there is no evidence of any knowledge or connection with the burglary claims of Greene.

In sum, the evidence shows that a number of related individuals, including the appellants, submitted a series of questionable insurance claims. That is not enough to satisfy the government's burden of proof and to sustain the jury's verdict. Guilt may not be inferred from "mere association." *United States v. Graham*, 548 F.2d 1302, 1312 (8th Cir. 1977); *United States v. Frol*, 518 F.2d 1134, 1137 (8th Cir. 1975). In order to sustain a criminal conviction, we must be convinced that the evidence does more than merely raise a suspicion or possibility of guilt. *United States v. Blunk*, 561 F.2d 111, 116 (8th Cir. 1977); *United States v. Jones*, *supra* at 1115. As we have held "[s]urmise cannot be permitted in a criminal case." *Id.* The

4. The government did establish by inference that Greene knew the medical records were fraudulent by establishing that Greene himself had written on the patient card submitted on behalf of his niece.

evidence presented by the government is simply insufficient to establish beyond a reasonable doubt that the appellants knowingly engaged in a single overall conspiracy to defraud insurance companies.[5]

We can understand how the jury arrived at the result it did on the conspiracy count. A large chart, which has been duplicated and is attached hereto (Government's Exhibit No. 163), was prepared by the government and used by it during the course of the trial. In our view, this chart oversimplified the evidence. It tended to indicate an association where none was established. When the verbal testimony and the exhibits are carefully examined, the inference that the government sought to establish by use of the chart simply disappears.

The trial court was aware of the dangers inherent in the use of the chart and was concerned throughout the trial with the government's attempt to prove a conspiracy. He refused to permit the chart to be received as an exhibit and to be taken by the jury into the jury room. He did, however, with some reluctance, permit the chart to be used during the course of the trial. We cannot say that he abused his discretion in so doing, but we have no hesitancy in holding that when the record as a whole is examined, the existence of a conspiracy simply was not proved.

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5. Nor do we feel that the government established the existence of separate conspiracies as to the submission of the accident and the burglary claims. There is not sufficient evidence to convince a fair minded jury beyond a reasonable doubt that Fuel or Julia Greene participated in either conspiracy. Thus, we need not consider this case in light of the test for fatal variance established in *Kotteakos v. United States*, 328 U.S. 750 (1946), and its progeny. *See, e.g., United States v. Anderson*, 552 F.2d 1296 (8th Cir. 1977); *United States v. Butler*, 494 F.2d 1246 (10th Cir. 1974); *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969).

B. *Substantive Counts.*

The substantive offense proscribed by 18 U.S.C. §1341, the mail fraud statute, is closely related to the offense of conspiracy set forth in 18 U.S.C. §371. *United States v. Donahue, supra* at 1135; *Isaacs v. United States, supra* at 725. There are, however, differences between a substantive violation of the mail fraud statute and a conspiracy to violate the statute.[6] Because of the differences, it is not necessarily inconsistent that a person be found guilty on the substantive counts but not on the conspiracy count. *Cf. United States v. West*, 549 F.2d 545, 553 (8th Cir.), *cert. denied*, 430 U.S. 956 (1977). We must, however, carefully examine the strength of the evidence with respect to each of the substantive counts in order to insure that the appellants' convictions on the substantive counts are sufficiently supported and are not merely the result of evidence introduced with respect to the conspiracy count. *Cf. United States v. Anthony*, 565 F.2d 533, 538-539 (8th Cir. 1977).

In order to establish a violation of 18 U.S.C. §1341, the government must prove the existence of a scheme to defraud and the mailing of a letter for the purpose of executing the scheme. *Pereira v. United States*, 347

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6. Unlike conspiracy, a scheme to commit mail fraud may be conceived and executed by one person. *United States v. Donahue*, 539 F.2d 1131, 1135 (8th Cir. 1976); *Isaacs v. United States*, 301 F.2d 706, 725 (8th Cir.), *cert. denied*, 371 U.S. 818 (1962). Second, when a

> person is charged with a substantive violation of §1341 * * * it is not necessary for the government to prove that he intended to use the mails * * * in furtherance of his fraudulent scheme; it is sufficient if they were in fact used; but where the charge is conspiracy to violate [§1341], the government must also show that the scheme contemplated the use of the medium in question. *Isaacs v. United States, supra*, and *Blue v. United States*, 138 F.2d 351 (6th Cir. 1943), *cert. denied*, 322 U.S. 736, 64 S.Ct. 1046, 88 L.Ed. 1570 (1944).

United States v. Donahue, supra at 1135.

U.S. 1, 8 (1954); *United States v. Cady*, 567 F.2d 771, 773 (8th Cir. 1977); *United States v. Brown*, 540 F.2d 364, 373 (8th Cir. 1976). Since the term "scheme," as used in §1341, connotes some degree of planning by the perpetrator of the mail fraud, it is essential that the government establish an intent to defraud. *United States v. Nance*, 502 F.2d 615, 618 (8th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975). While the government must establish beyond a reasonable doubt that the appellants acted with an intent to defraud, *United States* v. *Williams*, 545 F.2d 47, 50 n.2 (8th Cir. 1976), direct evidence of intent is not required. *United States v. Arnold*, 543 F.2d 1224, 1225 (8th Cir. 1976), *cert. denied*, 429 U.S. 1051 (1977). The requisite intent may be inferred from all the facts and circumstances surrounding the appellants' actions. *Id.; United States v. Nance, supra* at 618. Section 1341 "reaches schemes in which the defendant did not himself place any matter in the mails; it is sufficient to show that he 'caused' the mailings." *United States v. Calvert*, 523 F.2d 895, 903 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); *United States v. Brickey*, 426 F.2d 680, 684 (8th Cir.), *cert. denied*, 400 U.S. 828 (1970). The Supreme Court set forth the appropriate standard in *Pereira v. United States, supra*: "Where one does an act with knowledge that use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." *Id.* at 8-9.

We turn to a consideration of the sufficiency of the evidence with respect to each of the substantive counts.

1. *Count II.*

Greene was charged with causing his attorney to mail a fraudulent work-loss letter to Travelers Insurance Company with respect to a claim arising out of an accident, allegedly occurring on July 4, 1974. Travelers paid Greene $2,500 in settlement of his claim.

Greene provided his attorney with documentation in support of this claim, including a work-loss letter from Amoco Oil. The attorney then mailed the documentation to Travelers. The work-loss letter was dated September 6, 1974, and stated that Greene had lost 108 hours of work as a result of the July 4, 1974, automobile accident. It was signed by "T. Noble." The fraudulent nature of the letter was established at trial through the testimony of two Amoco employees and through Amoco personnel records. Thomas Noble testified that he worked at Amoco at a desk next to Greene during the time period in question. He disclaimed any knowledge of the letter and stated that the signature on the letter was not his. He further stated that he would not have been authorized to sign such a letter in any case. The Amoco personnel records revealed that Greene was only absent from work for 13.5 hours during the relevant time period and that he received compensation for 4.5 of those hours. It was established that Travelers relied upon the work-loss letter in paying Greene $2,500 in settlement of his claim.

Greene contends that the government failed to establish the necessary intent to defraud because it did not establish by direct evidence that he either knew the letter was false or that he had prepared it himself.[7] He also contends that it was not established that a mailing in furtherance of the scheme was "caused" by Greene. Greene's contentions are without merit. Direct evidence

7. Greene also contends that there was no evidence to show that Amoco's personnel records were necessarily accurate. However, he offered no evidence at trial that the records were inaccurate. In reaching its verdict, the jury concluded that the records were accurate. We do not disturb that finding here.

of intent is not required, and a fraudulent intent on the part of Greene can clearly be inferred from his action in submitting the false work-loss letter. *See United States v. Arnold, supra*; *United States v. Nance, supra.* While Greene did not actually mail the false documentation, he did cause it to be mailed under the standard set forth by the Supreme Court in *Pereira v. United States, supra.* The mailing of the false documentation to Travelers by the attorney was clearly foreseeable and would be expected to follow in the ordinary course of business.

2. *Count III.*

Greene and Fuel were charged with causing their attorney to mail a demand letter accompanied by fraudulent medical reports concerning an alleged accident on October 22, 1974, to Farmers Insurance Group. The attorney represented both Greene and Fuel. He did not recall ever meeting Fuel. Fuel did sign the contract retaining the attorney and a medical authorization form for the attorney. She was not identified as having indorsed either the check or the release in connection with the settlement of her claim.

Claims arising out of the accident were submitted on behalf of six individuals, including Greene, his wife, his niece and Fuel. It was established that Farmers relied upon the fraudulent medical records provided in settling the claims for $1,000 each.

The medical records were purportedly prepared by Dr. L. Virgil Miller. In 1973, Dr. Miller had been declared incompetent and placed under guardianship. He continued, however, in practice. Greene testified that Miller had treated him for injuries arising out of the October 22 accident. Employees from Dr. Miller's office recalled

seeing Greene, but not Fuel, at the office. An employee in Dr. Miller's office testified that the medical records submitted were not prepared in the office format or medical report style. A United States Postal Service document analyst testified that the reports had not been typed on the typewriters in Dr. Miller's office. He gave his expert opinion that Dr. Miller did not sign the reports, and that the reports had been signed by someone else in simulation of his handwriting. The document analyst could not eliminate the possibility that the signature on Fuel's medical report was not an "unnatural" signature of Dr. Miller caused by arthritis, old age or hardening of the arteries, conditions which Dr. Miller suffered from. He was positive, however, that the signature on Greene's medical report was not that of Dr. Miller. He was unable to identify the simulated signatures of Dr. Miller with anyone. The document analyst was, however, able to link Greene's writing to one of the reports. He testified that, with the exception of the word "released," all the writing on the patient card of Greene's niece had been done by Greene.

Both Greene and Fuel contend that the government failed to establish the necessary intent to defraud. After carefully examining the record, we are convinced that the government did present sufficient evidence from which the requisite fraudulent intent on the part of Greene could be inferred because of the identification of his writing with that on one of the medical reports submitted. The government did not present sufficient evidence, however, from which the requisite fraudulent intent could be inferred on the part of Fuel as it failed to establish she had any knowledge of the fraudulent nature of the medical reports.

3. *Count IV.*

Greene and Fuel were charged with causing their attorney to mail false medical reports, and an altered automobile repair estimate and bill, to Hertz Rental Company in connection with an alleged accident on February 10, 1975. The attorney had previously been retained in connection with the accident out of which Count III arose. The attorney did not recall meeting Fuel, but it was stipulated by the parties that she had retained the attorney. Eight individuals submitted claims arising out of the accident and Hertz paid $2,843 in claims. Fuel received $368 for medical expenses, and Greene received $221 for medical expenses and $209 for property damage. Fuel could not be identified as signing the settlement draft and release of her claim for $368.

Some of the medical reports were again purportedly signed by Dr. Miller. An employee from Dr. Miller's office testified that these reports were not of the format of reports prepared by that office. The United States Postal Service document analyst testified that the typewriting on the reports did not match the typewriting of the machines in Dr. Miller's office. He further testified that one of the medical reports submitted on behalf of Fuel did, however, contain an authentic signature of Dr. Miller.

The automobile repair estimate submitted was from Major Cadillac for repairs on Greene's 1972 Cadillac. It was stamped paid in the amount of $1,364.53. The document analyst stated that the repair estimate was an alteration of a repair estimate of $1,364.53 from Major Cadillac submitted to American Family Insurance in connection with an accident occurring on December 11, 1974.[8] He

8. None of the appellants were charged with respect to claims submitted in connection with the December 11, 1974, accident. Greene received $2,450, Julia Greene received $1,400 and Fuel received $1,450 from American Family.

further testified that another alteration of the same estimate was submitted by Greene to Cumis Insurance Company in another claim in connection with the February 10, 1975, accident. *See* discussion of Count V, *infra.*

There is ample evidence from which to infer the requisite fraudulent intent on the part of Greene through his contact with the attorney, the submission of the false medical reports and the submission of the altered repair estimate for his 1972 Cadillac. There is insufficient evidence to infer the requisite intent on the part of Fuel. She retained the attorney, but did not actively pursue the claim. She could not be identified as signing the settlement draft and the release of her claim. Moreover, the medical report submitted on her behalf does at least bear an authentic signature of Dr. Miller.

4. *Count V.*

Greene was charged with submitting an altered automobile repair estimate and bill to Cumis Insurance Company in connection with a claim arising out of the same accident in which the claims in Count IV allegedly arose. The claim was submitted by Greene, Julia Greene and Fuel to Cumis after receiving a settlement from Hertz. Cumis was Greene's insurance company.

As we have previously mentioned, the document analyst testified that the automobile repair estimate and bill for $1,364.53 that was submitted was an alteration of a document that had previously been submitted in connection with other claims. Greene testified that he paid for the repairs with his Diners Club credit card. However, the records of the Diners Club only reveal a charge of $1,364.53 on his December, 1974, billing. That billing would correspond only to payment in connection with the December

11, 1974, accident and not with respect to the February 10, 1975, accident—out of which the claims forming the basis for Counts IV and V arise.

Again, there is sufficient evidence from which to infer the requisite intent on the part of Greene.

5. *Count VI.*

Greene was charged with mailing a certified letter to Farmers Insurance Company enclosing various receipts in support of his claim with respect to an alleged burglary at his residence on December 2, 1973.[9] Farmers paid out $2,500 with respect to the claim. Greene had previously submitted claims to Allstate Insurance Company with respect to a burglary at the same residence on January 1, 1973. Allstate paid Greene $4,780 in settlement of that claim. The document analyst testified that thirty-nine of the exhibits submitted by Greene in support of his claim with respect to the December 2, 1973, burglary were copies from the same original documents from which copies had previously been submitted by Greene to Allstate as documentation for his claim with respect to the January 1, 1973, burglary.

The requisite fraudulent intent can be inferred from the submission of documentation that was shown to be duplicated from that used in support of a prior burglary claim. The mailing by Greene of a certified letter satisfied the requirement of causing the use of the mails.

6. *Count VII.*

Fuel was charged with causing the General Adjustment Bureau to mail to Cumis Insurance Company a report

9. Greene's landlord testified that a door window had been broken and that there was some evidence that a burglary might have occurred.

with respect to her claim arising out of an alleged burglary of her residence on February 6, 1975. The investigator from the General Adjustment Bureau testified that there was some evidence of the burglary.

Fuel gave the adjuster documentation in support of the claim, including a jewelry appraisal from Jaccard's Jewelry Store for a ring in the amount of $950 and a receipt from Woolf Brothers for $57.56. Both receipts were again used by Julia Greene in support of a subsequent claim against Allstate Insurance Company arising out of a burglary of her residence on April 23, 1975. An employee of Jaccard's testified that the appraisal form had been supplied to Julia Greene when she purchased a ring. The company records did not list a purchase by Fuel. In the claim submitted by Fuel, she stated that the burglary occurred at 3894 Chelsea. However, the Cumis policy she claimed against covered thefts from 3707 Prospect. The claim was withdrawn.

Fuel contends that the requisite fraudulent intent was not established and that the mailing of the report by the General Adjustment Bureau was not in furtherance of a scheme to defraud. We do not agree. The requisite intent can be readily inferred from the submission by Fuel of a claim for a ring that was not owned by her and for an address that was not covered by her insurance policy. Any inference that Fuel had received the ring from Julia Greene by gift or purchase was negated by the fact that Julia Greene subsequently submitted a claim for the same ring. Fuel admittedly did not place any matter in the mail herself. She did, however, "cause" the mailing of the report by the General Adjustment Bureau as such a report would be expected to result from her claim in the ordinary course of business. *See Pereira v. United States, supra* at 8-9; *United States v. Calvert, supra* at 903; *United States v. Brickey, supra* at 684.

7. *Count VIII.*

Greene was charged with causing Turpin Associates to mail a letter to Cumis Insurance Company relating to an automobile larceny allegedly occurring on September 9, 1975. The claim was made against a homeowner's policy on 3108 East 63rd Street. Greene had stated that he had owned the property since 1970 when he obtained the policy. The policy was obtained by phone. Testimony established, however, that Greene only rented the property and that the owner had not authorized him to procure insurance. The claim was withdrawn. Greene contends that there was no foundation laid to establish that he was the person who called and obtained the policy and, thus, that the government failed to satisfy its burden of proof of a fraudulent scheme. This contention has little merit since Greene, in effect, acknowledged his application for the policy when he susbmitted the claim on the policy.

8. *Count X.*

Greene and Julia Greene were charged with causing an attorney representing Allstate to write a letter to Julia Greene demanding that she provide substantiation for her claim with respect to burglary of her residence occurring on April 23, 1975. Documentation provided to Allstate in support of the claim included receipts from Jaccard's Jewelry and Woolf Brothers which were copied from the same original and previously submitted by Fuel in support of her burglary claim, and a receipt from Stix, Baer & Fuller for the purchase of a television. Greene supplied Julia Greene with the Woolf Brothers receipt. The Stix, Baer & Fuller receipt was written out to Julia Greene. An employee of Stix, Baer & Fuller testified that the receipt was not in the correct form since it contained a false salesman's number and because it was not the

form of receipt used by the television department. The United States Postal Service document analyst testified that the Stix, Baer & Fuller receipt to Julia Greene was handwritten by Merle Greene.

The existence of fraudulent intent on the part of both Merle and Julia Greene can clearly be inferred from the use of duplicated and falsified receipts. There is also sufficient evidence to support an inference that the defendants "caused" matter to be mailed in furtherance of the scheme. The use of the mails was clearly foreseeable either by the insurance company, its agents or adjusters, or by an attorney employed by the company to handle the claim. *See Pereira v. United States, supra* at 8-9; *United States v. Minkin*, 504 F.2d 350, 353-354 (8th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975); *Fisher v. United States*, 324 F.2d 775, 780 (8th Cir. 1963), *cert. denied*, 377 U.S. 999 (1964).

9. *Conclusion.*

In summary, there is sufficient evidence to support Fuel's conviction on Count VII, Julia Greene's conviction on Count X and Greene's convictions on Counts II, III, IV, V, VI, VIII and X.

III. *Severance.*

Each of the appellants contends on appeal that they were so prejudiced by the joint trial as to require severance under Fed.R.Crim.P. 14.[10] A motion to sever is ad-

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10. The appellants do not contest their initial joinder under Fed.R.Crim.P. 8. This Court has held that,

> [i]t is permissible and also customary to join a conspiracy count with separate substantive counts, *Pegram v. United States*, 361 F.2d 820, 821 (8th Cir. 1966); 1 C. Wright, *Federal Practice and Procedure* §144, at 330 (1969), even though

(*Continued on following page*)

dressed to the sound discretion of the trial court, *United States v. Anthony, supra* at 538; *United States v. Jackson, supra* at 523, and a denial of severance will only be grounds for reversal if "the appellants can show such clear prejudice that it indicates an abuse of the trial court's discretion." *United States v. Anthony, supra* at 538. We find no abuse of discretion here.

In considering a motion to sever, the trial court must balance the inconvenience and expense of separate trials against the prejudice to the codefendants in a joint trial. *See United States v. Wofford, supra* at 585. Individuals charged in a conspiracy are usually tried together, particularly where the proof of the charges is based upon the same evidence and acts. *See, e.g., United States v. Jackson, supra* at 523; *United States v. Graham, supra* at 1310; *United States v. Kirk*, 534 F.2d 1262, 1269 (8th Cir. 1976), *cert. denied*, 433 U.S. 907 (1977); *United States v. Hutchinson, supra* at 492. As we have stated, "[t]his rule reflects a strong desire to avoid multiple litigation and conserve judicial resources since proof of guilt is often based on the same evidence. Thus, the appellants have a heavy burden in showing that the trial court abused its discretion." *United States v. Anthony, supra* at 538 (footnote omitted).

The appellants contend they were prejudiced by the joint trial because it was impossible for the jury to compartmentalize the evidence and because the evidence

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Footnote continued—

some of the alleged co-conspirators are not charged in the substantive counts. *United States v. Leach*, 429 F.2d 956, 960 (8th Cir. 1970), *cert. denied*, 402 U.S. 986, 91 S.Ct. 1675, 29 L.Ed.2d 151 (1971); *Wangrow v. United States*, 399 F.2d 106, 109-10 (8th Cir.), *cert. denied*, 393 U.S. 923, 89 S.Ct. 292, 21 L.Ed.2d 270 (1968).

United States v. Graham, 548 F.2d 1302, 1310 (8th Cir. 1977).

against Greene was stronger than the evidence against Fuel or Julia Greene. We recognize that there is an inherent danger in a joint trial that the jury will convict on the basis of the cumulative evidence produced at trial, rather than on the basis of the quantum of evidence relating to each defendant. *United States v. Anthony, supra* at 538; *United States v. Graham, supra* at 1310. However, a defendant is not automatically entitled to severance because the evidence against a codefendant is more damaging than the evidence against him. *United States v. Anthony, supra* at 538; *United States v. Jackson, supra* at 525.

Here, the trial court carefully instructed the jury that it should weigh the evidence against each defendant individually, and that

> it is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his or her case determined from the evidence as to his own acts and statements and conduct, and any other evidence in the case which may be applicable to him.

While the evidence presented at trial was complex and confusing, the trial court could reasonably have believed that the jury was capable of compartmentalizing the evidence. The fact that it failed to do so with respect to some of the grounds is insufficient justification for us to now hold that the trial court abused its discretion in denying severance. There is, moreover, clear and convincing probative evidence implicating each of the appellants on certain of the substantive counts. We are unable to

agree with the appellants that they were convicted on the evidence accumulated against all of them. *See United States v. Graham, supra* at 1311.

IV. *Evidentiary Rulings.*

A. *Evidence of Other Insurance Claims.*

Each of the appellants objects to the admission of evidence relating to insurance claims which were not alleged in any of the substantive counts or any of the overt acts of the conspiracy count. The appellants particularly object to the use of the chart reproduced and attached hereto (Government's Exhibit No. 163). *See* Part II, A, *supra.* The trial court has broad discretion in determining the relevance of proposed pieces of evidence, *United States v. Williams,* 545 F.2d 47, 50 (8th Cir. 1976); *United States v. Johnson,* 516 F.2d 209, 214 (8th Cir.), *cert. denied,* 423 U.S. 859 (1975), and the admission of such evidence will only be grounds for reversal if the trial court abused its discretion. *United States v. Kills Crow,* 527 F.2d 158, 160 (8th Cir. 1975). We find no abuse of discretion on this record.

Evidence was admitted with respect to claims as to eight automobile accidents, four burglaries and one automobile larceny. Substantive counts were based upon claims filed with respect to three of the accidents, three of the burglaries and the one automobile larceny. Evidence as to the remaining claims was admissible under Fed.R.Evid. 404(b) to establish knowledge and fraudulent intent. *See* 2 J. Weinstein and M. Berger, WEINSTEIN'S EVIDENCE ¶404[09] (1977). Evidence with respect to Greene's January 1, 1973, burglary claim was relevant to show that thirty-nine receipts submitted with respect to that claim were later submitted with respect to Greene's claim arising

out of the December 2, 1973, burglary. Evidence as to the December 11, 1974, automobile accident was needed to establish that an automobile repair estimate submitted with respect to that accident was also later used in support of claims arising out of the February 10, 1975, automobile accident. The remaining automobile accident claims were used to establish that Greene had obtained insurance by misrepresentation and to help establish a recurrent pattern of claims.

B. *Admission of Exhibits Nos. 62, 177, 182 and 184.*

Fuel objects to the admission of Exhibits Nos. 62, 177, 182 and 184. Each of the exhibits were copies of receipts provided by Fuel to an insurance adjuster in connection with her February 6, 1975, burglary claim. The trial court initially refused to admit the exhibits because red markings had been placed on the exhibits in connection with the submission of the exhibits to a document analyst. "Whiteout" was placed over the red markings and the government reoffered the exhibits. Since the background paper was also white, the prominence of the markings was reduced. The trial court carefully instructed the jury to disregard the markings. We have examined these exhibits and cannot say that the trial court abused its discretion in admitting these exhibits.

C. *Production of Expert's Notes.*

The Greenes contend that they were entitled to the production of the documents and rough notes of the government's expert witness, a United States Postal Service document analyst, under the Jencks Act. 18 U.S.C. §3500 and *Brady v. Maryland,* 373 U.S. 83 (1963). This contention is without merit. The government provided defense counsel with the expert's reports prior to trial. The trial

court denied the motion for additional discovery after being informed that the expert does not use notes and, instead, dictates his findings directly.

V. *Jury Instructions.*

A. *Fuel's Requested Instruction No. 46.*

Fuel contends that the trial court erred in refusing to give her requested Instruction No. 46. A defendant is entitled to an instruction on his theory of the case, but only if it is properly requested and there is evidence to support the theory. *United States v. Brown, supra* at 380; *United States v. Nance, supra* at 619. Moreover, even if the instruction is proper, the trial court retains discretion in framing the instructions and there is no error if the trial court's instruction adequately covers the substance of the requested instruction. *United States v. Brown, supra.*

The requested instruction stated that Fuel suffered legitimate injuries from the automobile accidents and a legitimate property loss as a result of the burglary of her residence. It further stated that she submitted legitimate insurance claims with respect to those losses. Fuel did not testify and there is no testimony beyond her plea of not guilty to support these contentions. Accordingly, the trial court did not abuse its discretion in refusing to give that portion of the requested instruction.

The trial court did instruct the jury that every defendant has a right to have his theory of the case considered and that a plea of not guilty requires the government to prove all essential elements of its case beyond a reasonable doubt. It also instructed the jury that it should "consider with care the theories of defense as stated by defense counsel in closing argument." These instructions

adequately cover the substance of the remaining portions of Fuel's requested instruction.

B. *Instruction on Circumstantial Evidence.*

The Greenes argue that it was plain error for the trial court to have failed to instruct the jury that to support a conviction on circumstantial evidence, the evidence must be inconsistent with every reasonable hypothesis of innocence. We cannot agree. Circumstantial evidence is intrinsically as probative as direct evidence. *United States v. Holland, supra* at 139-140; *United States v. Scholle,* 553 F.2d 1109, 1118 (8th Cir. 1977), *cert. denied,* ..... U.S. ..... (1978). Since the Supreme Court's opinion in *Holland,* this Circuit has held that "instructions that circumstantial evidence alone affords a basis for conviction only if the evidence is completely inconsistent with innocence are now considered confusing and incorrect and the better rule is merely to instruct on the standards of reasonable doubt." *United States v. Fryer,* 419 F.2d 1346, 1350 (8th Cir.), *cert. denied,* 397 U.S. 1055 (1970).

C. *Instruction on Coconspirator's Statements.*

The Greenes contend that it was plain error for the trial court to give a cautionary instruction to the jury which permitted the jury to weigh the admissibility of the coconspirators' statements. This Circuit has recently held that Fed.R.Evid. 104(a) requires that questions of the admissibility of coconspirators' hearsay statements be determined by the trial court and, thus, that the jury no longer has a role in weighing the admissibility of such statements. *United States v. Macklin,* 573 F.2d 1046, 1048 (8th Cir. 1978); *United States v. Bell,* 573 F.2d 1040, 1043 (8th Cir. 1978). However, this case was tried before our decisions in *Macklin* and *Bell* which are to be applied only

prospectively. In the absence of an appellate decision on point, we cannot say that the cautionary instruction constituted plain error. *See United States v. Leonard Smith, et al,* Nos. 77-1510, 77-1514, 77-1515 and 77-1524 slip op. at 13 (8th Cir., filed May 17, 1978).

D. *Instructions as to Discussion of the Case.*

The Greenes finally contend that the trial court failed to fully instruct the jury at each recess that they should not read or talk about the case. This contention is without merit. The trial court did sufficiently admonish the jury not to read about or discuss the case. *See United States v. Miles,* 483 F.2d 1372, 1374 n.2 (8th Cir. 1973), *vacated on other grounds,* 415 U.S. 970 (1974).

VI. *Conclusion.*

We reverse the conviction of Merle Greene on Count I and affirm his convictions on Counts II, III, IV, V, VI, VIII and X. We reverse the convictions of Julia Greene on Count I and affirm her conviction on Count X. We reverse the convictions of Carolyn Porter Fuel on Counts I, III and IV and affirm her conviction on Count VII.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

GOVERNMENT'S EXHIBIT NO. 163

Accident Date	Claimant Name	Claim Paid ($)	Claim DEMAND	Police Report	Vehicle Type	Accident Location	Vehicle Repair	Ins. Co. Claim No.
April 24, 1973	William Gardenhire Sheri Victor Merle Greene, Jr.	100.00 - 353.83	100.00 - 353.83	NONE	1965 Olds.	73rd & Wornall	353.83	Amer. States A-292529
April 11, 1974	Merle Greene, Jr. Winston Dillard	1,315.00 -	1,315.00 -	At Scene	1973 Chev.	62nd & Sw. Pkwy.	-	Farmers Ins. 1429668389
July 4, 1974	Merle Greene, Jr. Julia Greene Sandra Greene Melvin Greene William Gardenhire	2,500.00 1,750.00 2,500.00 1,150.00 -	3,250.00 2,750.00 2,750.00 1,650.00 -	Walk in Report	1965 Olds	63rd & Pasco	710.00	Travelers Ins. Co. 077ABA-633033
October 22, 1974	Merle Greene, Jr. Carolyn Porter (Fuel) Sandra Greene Frances Greene Delores Santiago Demonica Santiago Zenette Pearson	1,000.00 1,000.00 1,000.00 1,000.00 1,000.00 1,000.00 -	1,750.00 1,850.00 1,750.00 1,750.00 1,850.00 1,850.00 -	Walk in Report	1973 Chev.	63rd & Troost	--	Farmers Ins. Grp. 1429668389
December 11, 1974	Merle Greene, Jr. Julia Greene Carolyn Fuel Sandra Greene Delores Santiago Frances Greene William Gardenhire	2,450.00 1,400.00 1,455.00 2,450.00 2,400.00 1,600.00 -	3,500.00 2,300.00 2,300.00 3,250.00 2,300.00 3,000.00 -	Walk in Report	1972 Cadd.	24th & Holmes	1,364.53	American Family M-88761
February 10, 1975	Merle Greene, Jr. Julia Greene Carolyn Fuel Sandra Greene Frances Greene Delores Santiago Merle Greene III Wanda Minor James Roundtree - (AKA - Jaimie Nixon)	430.00 325.00 368.00 430.00 325.00 325.00 325.00 315.00	3,610.00 1,750.00 1,900.00 2,250.00 1,750.00 1,700.00 1,750.00 1,700.00	Walk in Report	1972 Cadd.	I-435 & 63rd St.	1,364.53	Hertz Rental & Cumis Ins. 4-31603
June 5, 1975	Carolyn Porter (Fuel) Delores Santiago Wanda Minor Ewing Minor Gerald Porter Demonica Santiago Rita (Lazelle) Nixon	- 0 -	- 0 -	Walk in Report	1972 Cadd.	22nd & Holmes	1,494.37	American Family & State Farm - M89459
June 6, 1975	Merle Greene, Jr. Sandra Greene Merle Greene III Shirley Lumelle Rita Lazelle (Nixon) Robin Fuel David Hughes	- 0 -	- 0 -	At Scene	1972 Cadd.	Swope Pkwy. & Meyer	-	State Farm 25-4177-075
BURGLARY, LARCENY CLAIMS:								
1/1/73	MERLE GREENE, Jr.	4,780.00	7,180.00	Burg.		3108 E. 63rd		ALLSTATE 10E50456
12/2/73	MERLE GREENE, Jr.	2,500.00	28,800.00	Burg.		3108 E. 63rd		FARMERS 20866389
2/6/75	CAROLYN FUEL	(withdrawn) - 0 -	11,400.00	Burg.		3894 Chelsea		CUMIS H0952458
4/23/75	JULIA GREENE	(withdrawn) - 0 -	6,500.00	Burg.		3110 E. 63rd		ALLSTATE 10G60936
9/9/75	MERLE GREENE, Jr.	(withdrawn) - 0 -	7,700.00	Larc.		L.A. Calif.		CUMIS H69990

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

September Term, 1978

No. 77-1896

United States of America,
Appellee,

vs.

Merle O. Greene, Jr., et al.,
Appellants.

Appeal From the United States District Court for the Western District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

September 28, 1978

Supreme Court, U. S.
FILED
JAN 8 1979
MICHAEL RODAK, JR., CLERK

No. 78-708

In the Supreme Court of the United States

OCTOBER TERM, 1978

MERLE O. GREENE, JR. and
JULIA GREENE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-708

MERLE O. GREENE, JR. and
JULIA GREENE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 583 F. 2d 978.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1978. A petition for rehearing was denied on September 28, 1978. The petition for a writ of certiorari was filed on October 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court committed reversible error in refusing to sever petitioner Julia Greene's trial from that of petitioner Merle Greene.

2. Whether the district court erroneously instructed the jury with respect to the admissibility of co-conspirator declarations.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioners Julia and Merle Greene[1] were convicted of conspiracy to commit mail fraud and various substantive mail fraud charges, in violation of 18 U.S.C. 371 and 1341. Petitioner Merle Greene was sentenced to two years' imprisonment on one of the substantive counts, to be followed by concurrent three-year terms of probation on each of the remaining counts. Petitioner Julia Greene was sentenced to concurrent three-year terms of probation on the conspiracy count and on the one substantive count on which she was found guilty. The court of appeals reversed petitioners' conspiracy convictions and affirmed their convictions on the substantive counts (Pet. App. A1-A26).[2]

The evidence is set out in detail in the opinion of the court of appeals (Pet. App. A10-A19). In brief, the government showed that during the period from January 1, 1973, to August 1, 1975, Merle Greene submitted a number of claims against various insurance companies arising out of purported automobile accidents, burglaries, and thefts.

One of the claims filed by petitioner Merle Greene was supported by a forged work-loss letter stating that he had lost 108 hours of work because of an accident on July 4,

[1]Petitioner Merle Greene is the son of petitioner Julia Greene (Pet. App. A3).

[2]Petitioners were tried together with co-defendant Carolyn Porter Fuel. Fuel was convicted of conspiracy and three substantive mail fraud violations. The court of appeals affirmed her conviction on one of the substantive counts, but it reversed her convictions on the conspiracy count and on two of the substantive counts.

1974. Petitioner's work records reflected that he had actually missed only 13½ hours out of the claimed 108 hours and that he was paid for 4½ hours of that time (Tr. 106, 145-146, 151, 153-154, 163; Govt. Exh. 110, 191). That claim, for which he received $2,500 in settlement, formed the basis of count two of the indictment (Tr. 133, 136).

The evidence further showed that petitioner Merle Greene caused his attorney to mail medical reports to support insurance claims arising from accidents that he claimed had occurred on October 22, 1974, and February 10, 1975 (Tr. 228, 274). The medical reports relating to both claims were shown not to be genuine (Tr. 228, 237-238, 297-300, 315-316, 392-393). The medical report submissions formed the basis for the charges in counts 3 and 4 of the indictment.

Petitioner Merle Greene also caused his attorney to mail to the Hertz Rental Company on petitioner's behalf an invoice in the amount of $1,364.53—the purported amount of the damage resulting from the incident on February 10 (Tr. 364; Govt. Exh. 119). The invoice turned out to be an altered version of a repair estimate that had been submitted to another insurance company in connection with a previous accident (Tr. 343-344, 389). Petitioner submitted the same bill to a third insurance company to support a second claim arising out of the alleged February 10 accident (Tr. 276, 389, 438). Count 5 of the indictment was based on that submission.

Petitioner Merle Greene also submitted claims to two insurance companies in connection with an alleged burglary at his residence on December 2, 1973, and an automobile larceny allegedly occurring on September 9, 1975. In support of the burglary claim, petitioner enclosed numerous documents and receipts, 39 of which were copies of items he had previously submitted to another insurance company in support of an alleged burglary at the same residence on January 1, 1973 (Tr. 187, 496, 498,

511). He received $4,750 as a result of the first claim and $2,500 as a result of the second (Tr. 804). Count 6 of the indictment was based on the burglary claim. The automobile larceny claim was made on a homeowner's policy obtained by petitioner on his representation that he owned his residence, which in fact he only rented (Tr. 447-448, 460, 727). That claim was the basis of count 8 of the indictment.

Finally, the evidence established that petitioners Merle and Julia Greene submitted various documents in support of an alleged burglary of Julia Greene's apartment on April 23, 1975. Several of the documents had previously been altered and submitted as documentation for an alleged burglary of co-defendant Carolyn Fuel's residence (Tr. 522, 543, 555, 564-565, 567). Several of the receipts supporting the claim were supplied to Julia Greene by Merle Greene (Tr. 568-569).

ARGUMENT

1. Petitioners contend that the reversal of their convictions on the conspiracy count "resulted in a misjoinder of offenses and defendants under Rule 8, Federal Rules of Criminal Procedure" (Pet. 13). As the court of appeals noted, however, petitioners never contested their initial joinder (see Pet. App. 19-20 n.10). Moreover, after initially joining defendant Fuel's motion for a severance (Tr. 380-381), petitioners' counsel subsequently stated that petitioners were opposed to a severance (Tr. 919-920). Because petitioners did not preserve this issue by objecting to the joint trial, it is not now properly presented for review. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958).

In any event, the joinder of petitioners and co-defendant Fuel was proper under Fed. R. Crim. P. 8(b), which allows joinder of co-defendants "if they are alleged to have participated in the same act or transaction or in

the same series of acts or transactions constituting an offense or offenses." All three defendants were charged with mail fraud conspiracy, and each was charged with substantive mail fraud offenses. As the court below noted, "[i]t is permissible and also customary to join a conspiracy count with separate substantive counts * * * even though some of the alleged co-conspirators are not charged in the substantive counts" (Pet. App. A19-A20 n.10, quoting from *United States* v. *Graham*, 548 F. 2d 1302, 1310 (8th Cir. 1977).

Although the court of appeals reversed petitioners' conspiracy convictions, it is well settled that the presence of conspiracy counts renders joinder appropriate under Fed. R. Crim. P. 8—absent bad faith on the part of the government in charging conspiracy—and that the subsequent removal of the conspiracy charges, by dismissal or reversal, does not mandate a severance under Fed. R. Crim. P. 14. See *Schaffer* v. *United States*, 362 U.S. 511 (1960); *Peterson* v. *United States*, 405 F. 2d 102, 105-106 (8th Cir. 1968), cert. denied, 395 U.S. 938 (1969); *United States* v. *Catino*, 403 F. 2d 491, 495 (2d Cir. 1968), cert. denied, 394 U.S. 1003 (1969); *Fernandez* v. *United States*, 329 F. 2d 899, 905-906 (9th Cir.), cert. denied, 379 U.S. 832 (1964). Moreover, the offenses with which the three defendants were charged were substantially interrelated. For example, petitioners Merle and Julia Greene together submitted documents in support of an insurance claim for a burglary of Julia Greene's home; the documents turned out to be copies of documents co-defendant Fuel had used in connection with the burglary claim on which she was convicted. See *United States* v. *Friedman*, 445 F. 2d 1076, 1082-1083 (9th Cir. 1971).

Petitioners also contend that they were prejudiced by the joint trial because the evidence against Merle Greene was stronger than the evidence against Julia Greene. In trials involving more than one defendant, the evidence

normally varies from one defendant to another, but the disparity in evidence does not by itself establish prejudice. See, *e.g.*, *United States* v. *McGruder*, 514 F. 2d 1288, 1290 (5th Cir. 1975), cert. denied, 423 U.S. 1057 (1976); *United States* v. *Rizzo*, 491 F. 2d 215, 218 (2d Cir.), cert. denied, 416 U.S. 990 (1974). In this case, however, there were only three defendants, the trial was not particularly long, and trial judge carefully instructed the jury "to give separate, personal consideration to the case of each individual defendant" (Pet. App. A21). As the court of appeals noted, there is nothing in the record to suggest that the jury was unable to evaluate the evidence against the three defendants separately, according to the court's instructions.

This case is readily distinguishable from *United States* v. *Kelly*, 349 F. 2d 720, 756-759 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966), upon which petitioners rely. The court in *Kelly* held that severance should have been granted because a very thin case against one defendant was unfairly bolstered by "spillover" from the proof against much more clearly culpable defendants. See also *United States* v. *Mardian*, 546 F. 2d 973, 977 (D.C. Cir. 1976). In this case, by contrast, there was "clear and convincing probative evidence implicating each of the appellants on certain of the substantive counts" (Pet. App. A21).

2. Petitioners contend that the trial court should have determined the admissibility of any co-conspirator declarations rather than submitting the admissibility question to the jury (Pet. 9). But petitioners acquiesced in the trial court's charge regarding the admissibility of co-conspirators' declarations (Tr. 893, 894, 1008).[3] Moreover,

[3]Petitioners assert that they objected to the court's charge with respect to the admissibility of co-conspirators' declarations (Pet. 7), but they do not refer to any place in the record that they made such an objection. The court of appeals treated their claim as a "plain error" contention (Pet. App. A25), and we have been unable to find any place in the record where such an objection was made. Petitioners did object to the government's introduction of evidence of various of the defendants' *acts* to prove that they were engaged in a conspiracy (see Tr. 493), but the court gave an instruction to the jury dealing with the government's proof of overt acts in which the court explained that the jury "may draw no inferences of wrongdoing whatsoever from evidence of an ordinary innocent overt act unless and until you are convinced beyond a reasonable doubt that the conspiracy alleged in the Indictment was willfully formed, that the person committing the overt act was a member of the conspiracy at the time the act was committed, and finally that the act itself was done to further the purpose of the conspiracy" (Tr. 494). Defense counsel agreed that the court's instruction accurately stated the law and did not object to the giving of that instruction (Tr. 491-492).

the only out-of-court statements by any of the defendants that were introduced at trial were components of the fraudulent submissions that constituted the *corpus delicti* of the various mail fraud charges. Those statements were therefore not hearsay at all, irrespective of the rule regarding co-conspirator declarations, and they were properly admitted. See. Fed. R. Evid. 801(c); *United States* v. *McDonnel*, 550 F. 2d 1010, 1012 (5th Cir.), cert. denied, 434 U.S. 835 (1977); *United States* v. *Burke*, 495 F. 2d 1226, 1232 (5th Cir.), cert. denied, 419 U.S. 1079 (1974); *United States* v. *Tyminski*, 418 F. 2d 1060, 1062 (2d Cir. 1969), cert. denied, 397 U.S. 1075 (1970).

Accordingly, the trial judge was not required in this case to make any admissibility determination, whether preliminary or conclusive. The evidence consisted primarily of documentation, expert testimony, and lay witnesses called to establish custody and identification of records. No witness took the stand to testify to any out-of-court statements by a co-conspirator inculpating another co-conspirator who was not present at the time the statement was made. Accordingly, the variance in the standards

relating to the admissibility of co-conspirators' declarations (Pet. 9-12) is not posed in this case.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]In any event, as the court of appeals observed, the Eighth Circuit has held that its decisions interpreting Rule 104(a) to require the judge to determine admissibility are to be applied only prospectively. See *United States* v. *Bell*, 573 F. 2d 1040, 1044-1045 (8th Cir. 1978); *United States* v. *Macklin*, 573 F. 2d 1046, 1048-1049 (8th Cir.), cert. denied, No. 77-6895 (October 2, 1978); see also *United States* v. *Martorano*, 557 F. 2d 1, 11 (1st Cir.), affirmed on rehearing, 561 F. 2d 406 (1977), cert. denied, 435 U.S. 922 (1978); *United States* v. *James*, 576 F. 2d 1121, 1132 (5th Cir. 1978); *United States* v. *Enright*, 579 F. 2d 980, 986-987 (6th Cir. 1978); *United States* v. *Santiago*, 582 F. 2d 1128, 1135 (7th Cir. 1978).

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